Lloyd J. in his judgment in *Cerealmangimi* v. *Toepfer*[8] applied the principles stated in *Bremer* v. *Mackprang*.[9] This is what he said, at pp. 340-341:

"I take the law from what I believe to be the most recent authority in the Court of Appeal on this topic, namely, *Bramer Handelsgesellschaft m.b.H.* v. *C. Mackprang Jr.*, [1979] 1 Lloyd's Rep.221. Lord Denning, M.R., reviewed a number of cases including the decision of the House of Lords in *Bremer Handelsgesellschaft m.b.H.* v. *Vanden Avenne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109. He quoted a passage from Lord Salmon's speech (at p.225) as follows:

... To make an unequivocal representation or waiver, it is not necessary for the buyers to say – 'We hereby waive it'. It is quite enough if they behave or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect there might be in the notice and were accepting it as effectively extending the date of delivery ... If the buyers, by their telexes or by their conduct lead the sellers to believe that they accepted the notice as a good notice, they necessarily waived any defect it might contain, whether they were aware of it or not ..."

Lord Denning went on to state the principle thus:

"I regard the decision of the House in *Bremer* v. *Vanden* as a most important decision on waiver. As Mr. Davenport said, it is the final step in the series [starting with] *Central London Property Trust Ltd.* v. *High Trees House*, [1949] K.B. 130. ... Applied to cases of waiver in GAFTA cases, it may be stated thus: If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect – whether he knows of it or not – then he cannot afterwards set up the defect as a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so."

Lord Justice Shaw expressed himself in complete agreement with [the] views stated by Lord Denning. He said at p.230:

"[Conduct] need not be such as to amount virtually to an express declaration that this or that right is waived or surrendered. If in the prevailing conditions affecting the position of the parties to a contract the conduct of one of them affords a reasonable foundation for the inference that he is prepared to forgo any right or rights he may have in a certain regard and the other contracting party does draw that inference and persists in the residual contractual relationship upon that basis, then whether it be regarded as waiver or estoppel the foregoing of those rights cannot thereafter be gainsaid. This seems to me the effect of the observations of Lord Salmon in *Bremer* v. *Vanden* ..."

Later in the same judgment Lord Justice Shaw said:

"[The buyers'] Counsel sought to reinforce his argument against the implication of waiver by laying emphasis on the buyers' ignorance as to whether, on the facts if and when they became known, the sellers could claim to be exonerated from liability for failing to deliver as required by their contract. I see no reason, however, to limit the effect of waiver to rights known to exist. It may be embracing enough, and so intended, as to forgo rights which might exist in regard to a particular contract or in a particular context."

Lord Justice Stephenson dissented. In his view the majority in *Bremer* v. *Mackprang* were carrying the doctrine of waiver further than it had been carried by the House of Lords in *Bremer* v. *Vanden*. But Lord Justice Stephenson's judgment contains this important paragraph (at p.229):

"I do not understand Lord Salmon's reference to the buyers waiving any defect in the notice under cl. 22 'whether aware of it or not' as laying down any principle that there can be waiver or equitable estoppel on the part of someone who does not know that his rights have been infringed or has not, at the least, such obvious means of knowing that his rights have been infringed that the other party can reasonably assume that the party waiving or estopped is acting with knowledge of their infringement. Lord Salmon was, I think, referring to a patent defect which could only be missed by not reading the notice or not knowing the law."

I propose, therefore, to make the order sought by the summons. The company must pay the costs.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Ng Ek Teong & Partners.*

SALIM BIN DAWING v. LIM KAT KANG

[O.C.J. (Shankar J.) December 13 & 26, 1984]

[Johore Bahru – Civil Suit No. 311 of 1981]

Damages – Quantum – Distinction between damages for loss of future earnings and loss of earning capacity – Principles applicable in claim for loss of earning capacity.

Damages – Leg – Shortening 3cm. – Fractured femur, tibia and fibula etc.

The plaintiff who was a 29 year old clerk in the Education Department, Johore, met with an accident while riding his motor scooter. He suffered the following injuries: fracture of the lower 1/3 of the right femur, the right tibia and fibula, and the right 2nd and 3rd metatarsal bones. There was a permanent shortening of 3 cm of the right leg, a stiffness of the right ankle and subtalar joints with an equinus or plantar-flexion deformity at the ankle and deformity in the 2nd and 3rd toes. As a result of the injuries, he could

develop osteoarthritic changes in the right knee. He will have difficulty in negotiating steps, walking on slopes and he will not be able to squat. Liability was admitted and it was agreed that the plaintiff should receive $26,000 as general damages and $1,585 as special damages. The only issue before the court was what additional sum, if any, should be awarded to a plaintiff who had not suffered any actual loss of present or future earnings but nevertheless claims that there has been a diminution of his earning capacity on the open market or a loss of promotional prospects in his existing environment by reason of the residual disabilities which he has sustained.

Held: (1) there was no doubt that the plaintiff sustained severe injuries but a claim for loss of future earnings is an altogether different head of damages from a plaintiff's loss of earning capacity;

(2) this head of damage is concerned with a plaintiff's loss of earning capacity where as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury. What is being compensated is the risk that the plaintiff may lose his employment in future and be at a disadvantage in getting alternative employment because of his injury.

Cases referred to:

(1) *Jefford* v. *Gee* [1970] 2 Q.B. 130; [1970] 1 All E.R. 1202.
(2) *Othman bin Ahmad* v. *Singapore Traction Co. Ltd.* [1966] 1 M.L.J. 64, 65 & 66.
(3) *Moeliker* v. *A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9.

CIVIL SUIT.

N. Jegatheesan for the plaintiff.
S. P. Veloo for the defendant.

Cur. Adv. Vult.

Shankar J. : The only issue which remains to be decided in this case is an important one. It concerns the principles which this Court should apply when deciding whether any damages should be awarded to a plaintiff who has not suffered any actual loss of present or future earnings but nevertheless claims that there has been a diminution of his earning capacity on the open market or a loss of promotional prospects in his existing environment by reason of the residual disabilities which he has sustained.

Salim bin Dawing was 29 years old at the date of the trial of this action. He started as a clerk in the Education Department Johore on June 1, 1975. On October 19, 1979 he was attached to the Sekolah Kebangsaan Pasak Kota Tinggi. That was the day he met with an accident. He was riding his motor scooter and was run down by the defendant.

Liability was admitted at the trial. General damages on all heads but one (*i.e.* loss of earning capacity or promotional prospects) was agreed at $26,000. Specials were agreed at $1585. There must be judgment for the plaintiff for these sums. What additional sum, if any, should be awarded for the contested issue is what we are now concerned with in this case. In the past damages for loss of earning capacity was usually included in the global sum for pain and suffering and loss of amenity. But since *Jefford* v. *Gee*[1] parties are entitled to require that damages under this head be separately quantified. But the difficulty arises because after the accident the plaintiff continued in the same job. He suffered no loss of pay despite the physical handicaps brought about by the accident. It is not necessary to set these out in any great detail. Suffice it to say that his more serious injuries were a fracture of the lower 1/3 of the right femur, the right tibia and fibula, and the right 2nd and 3rd metatarsal bones. He saw the Orthopaedic Surgeon Mr. V. Kandasamy Pillay on October 17, 1980. He stated it as his opinion that:—

> "There is no doubt that this patient has sustained severe injuries to the right lower limb that has left him with a permanent shortening of 3 cm, a stiffness of the right knee, a stiffness of the right ankle and subtalar joints with an equinus or plantar-flexion deformity at the ankle and deformity in the second and third toes. There will be no further recovery from this. If anything, he could develop osteoarthritic changes in the right knee and may need to have the knee fused or arthrodesed (that is completely stiffened) to stop the pain that could come on in the event of osteoarthritic changes arising in this knee. His activities have to be curtailed and he will not be able to take part in any games. He will have difficulty in negotiating steps, walking on slopes and uneven ground and he will not be able to squat."

The plaintiff gave practical examples of how these disabilities had adversely affected his work as a clerk. He says he can no longer drive to the Bank to deposit School funds, cannot supervise the School gardener, cannot attend meetings or go unaccompanied to Johore Bahru once a year to buy account books. Socially he claims he cannot attend *Kenduris* and religious functions, and cannot participate in sports.

He thinks his disabilities have affected his promotion prospects. But at the time of his accident his salary was $420. At the time of trial it was $595. It is the usual practice for clerks with 8 years service to be invited to apply for promotion. Such an invitation materialised and the plaintiff applied in March 1983 for promotion. At the date of the trial he had not yet been called for an inter-

view. There is absolutely no evidence to suggest that this was in any way due to the accident. A senior clerk's post to which clerks may be promoted attract a salary of $1040/- per month as opposed to $925 which is the maximum on time scale for a clerk.

The plaintiff called as his only witness the Principal of his school from January 1, 1980 up to August 16, 1983. Although he felt the plaintiff's work was below par, and that his injuries had affected his attitude to this work, he nevertheless recommended the plaintiff for a promotion. As a Government servant he says the plaintiff can be transferred to another Department where his duties need not entail the same kind of work involved in the School.

Looking at the plaintiff giving evidence and demonstrating his disabilities I could not help feeling that he was a man who was making the most of his troubles and that a more positive attitude to overcoming them would have benefited him considerably. There is no doubt that he has sustained severe injuries but a claim for loss of future earnings is an altogether different head of damages from a plaintiff's loss of earning capacity.

This distinction was not considered in *Othman bin Ahmad* v. *Singapore Traction Co. Ltd.*[2] The Court at first instance gave $5000 for loss of future earnings where an old employee had been kept on in employment doing light duties. His chance for promotion was said to be fair. On appeal, Chua J. considered the plaintiff's existing osteoarthritis a very important factor. The plaintiff was 28 and the strong possibility that disease might become so crippling with the passage of time as to prevent him from working at all, contributed to an enhancement of the award under this head to $10,000.

The distinction was highlighted in *Moeliker* v. *A. Reyrolle & Co. Ltd.*[3] I have found the analysis by Browne L.J. of the principles to be applied of invaluable assistance to me, especially the passages commencing at pages 15 to 18.

The important point to bear in mind seems to me to be that this head of damage is concerned with a plaintiff's loss of earning capacity where as a result of his injury his *chances* in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury. What is being compensated is the risk that the plaintiff may lose his employment in future and be at a disadvantage in getting alternative employment because of his injury.

The judgment of Stephenson L.J. makes something else clear. The Court was not dealing with a loss or impairment of promotional prospects. It was concerned with the risk of losing the job altogether. The judge has then to consider first this risk, and secondly if the job is lost, the plaintiff's chances of getting another job. If the risks are negligible no award should be made. If they are real but not serious then a modest award is called for. If it is serious then a substantial award going into thousands of pounds is in order.

In "Claims for loss of earning in personal injury actions" by C.H. Bennett – "LITIGATION" (November–December 1982) Volume 2 at page 109 the learned author talks of impaired promotion prospects being compensated for by means of a lump sum payment or if the promotion can be shown to be a probability by an increase in the multiplicand. This seems to suggest that the head of damage being considered here is loss of future earnings, and not a loss of earning capacity. But the disabilities are there and, on the evidence before me, I hold that the risks of the plaintiff losing his present job or of his being unable to get another job (to use the words of Browne L.J. at p. 18) are only slight and a low award is right.

In the circumstances of this case where the plaintiff is a government servant with ample security of tenure I do think it is in order to lump this alleged impaired promotional prospects into the same exercise. No one has come forward to say that his disabilities will be held against him in a promotion exercise. It may even be an advantage if he displayed the right attitude to his work. In my view a sum of $3,000 is proper for this head. Accordingly, I adjudge that the plaintiff do recover $29,000 by way of general damages and $1,585 as special damages with the usual interest thereon. The plaintiff will also have his costs of this action.

Order accordingly.

Solicitors: *John Ang & Jega; V.P. Nathan & Partners.*